

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR
ENVIRONMENTAL RESPONSIBILITY,
2000 P Street, NW Suite 240
Washington, D.C. 20036

Plaintiff,

V.

Civil Action #

PIPELINE AND HAZARDOUS MATERIALS
SAFETY ADMINISTRATION
East Building, 2nd Floor
1200 New Jersey Ave., SE
Washington, DC 20590

COMPLAINT

Defendant.

PRELIMINARY STATEMENTS

1. This action is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, as amended, in order to compel the Defendant, Pipeline and Hazardous Materials Safety Administration ("PHMSA" or "the Agency"), to disclose records wrongfully withheld in failing to respond within the statutory deadline to Plaintiff's, Public Employees for Environmental Responsibility ("PEER"), FOIA request.
2. FOIA requires that federal agencies respond to public requests for records, including files maintained electronically, in order to increase public understanding of the workings of government and for access to government information.
3. Plaintiff is a non-profit organization with tax-exempt status dedicated to research and public education concerning the activities and operations of the federal government.

4. Plaintiff's FOIA requests, submitted on October 2, 2012 and October 22, 2012, sought records related to the PHMSA's activities with regard to oil spill prevention and preparedness and whether PHMSA is complying with its statutory mandates under the Oil Pollution Act of 1990. To date, Plaintiff has not received complete records responsive to these requests.
5. Defendant's conduct is arbitrary and capricious and amounts to a denial of Plaintiff's FOIA requests. Defendant's conduct frustrates Plaintiff's efforts to educate the public regarding information relating to oil spill response and preparedness by pipeline operators and PHMSA's oversight and management.
6. Plaintiff constructively exhausted its administrative remedies under FOIA, 5 U.S.C. § 552(a)(6)(C), and seeks a court order requiring Defendant to immediately produce the records sought in its FOIA requests as well as other appropriate relief.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action under FOIA, 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action under 28 U.S.C. § 1331.
8. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
9. This Court is a proper venue because Plaintiff resides in this district. 28 U.S.C. § 1391(e)(1)(C) (where defendant is the government or a government agent, a civil action may be brought in the district where the plaintiff resides if there is no real property at issue). Venue is also proper under 5 U.S.C. § 552(a)(4)(B).
10. This Court has the authority to award costs and attorneys' fees under 28 U.S.C. § 2412 and 5 U.S.C. § 552(a)(4)(E).

PARTIES

11. Plaintiff, PEER, is a non-profit public interest organization, with its main office located in Washington, D.C., and field offices located in California, Colorado, Florida, Massachusetts, Arizona, New Jersey, and Tennessee.
12. PEER is not a commercial enterprise for purposes of the fee waiver provisions of FOIA. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Among other public interest projects, PEER engages in advocacy, research, education, and litigation relating to the promotion of public understanding and debate concerning key current public policy issues. PEER focuses on the environment, public lands and natural resource management, public funding of environmental and natural resource agencies, and ethics in government.
13. Informing the public about these important public policy issues is central to PEER's mission. PEER educates and informs the public through news releases to the media, its web site, www.peer.org, which draws between 1,000 and 10,000 viewers per day, and its newsletter which has a circulation of approximately 20,000, including 1,500 environmental journalists.
14. Defendant PHMSA is an agency of the United States as defined by 5 U.S.C. § 552(f)(1). PHMSA is charged with the duty to provide public access to records in its possession consistent with the requirements of the FOIA. Here, PHMSA is denying Plaintiff access to its records in contravention of federal law.

FACTS

15. Plaintiff's first request, dated and submitted to Defendant on October 2, 2012 (request number 2013-0001), requested current facility response plans submitted to pipeline operators; all current facility response plans approved by PHMSA; records reflecting the number of facility response plans accepted or rejected by PHMSA; records reflecting the

name of all pipeline operators currently required to have approved facility response plans; and all facility response plan questionnaires submitted by pipeline operators.

16. Plaintiff's second request, dated and submitted to Defendant on October 22, 2012 (request number 2013-0011), sought records relating to the Agency's participation in exercises under the Oil Pollution Act of 1990 from the year 1995 to date, 2012. This request specifically asked Defendant for their records reflecting the total number of unannounced exercises that the Agency or its predecessor, the Research and Special Programs Administration ("RSPA") if applicable, led or are leading under the Oil Pollution Act of 1990. The request also asked for the Agency's records reflecting the total number of unannounced exercises that PHMSA participated in that another government entity initiated or sponsored.
17. These requests serve to help the public because the records sought will shed light on how PHMSA is working to serve the public health and safety. The requested records will show PHMSA activities with regard to oil spill prevention and preparedness and whether PHMSA is complying with its statutory mandates under the Oil Pollution Act of 1990.
18. Plaintiff believes that disclosure of the requested information will offer the general public a clear picture of whether PHMSA, one of the agency's tasked with ensuring that pipeline operators are complying with the laws, is operating in a manner to prevent and limit human and environmental harm.
19. In a letter dated October 9, 2012, Defendant acknowledged receipt of Plaintiff's October 2, 2012 FOIA request and assigned it request number 2013-0001 and granted PEER's fee waiver request. This letter was signed, Marilyn Burke, PHMSA FOIA Program Manager.

20. In a letter dated October 24, 2012, Defendant acknowledged receipt of Plaintiff's October 22, 2012 FOIA request, assigned it request number 2013-0011, and granted PEER's fee waiver request. This letter also indicated that PHMSA had a backlog of requests and would not provide a final response within twenty days, as it must respond to FOIA requests in the order in which they are received. This letter was signed, Marilyn Burke, PHMSA FOIA Program Manager.
21. To date, Plaintiff has received only initial responses to its October 2, 2012 request (2013-0001) dated November 15, 2012, including six facility response plans and a current list of facility response plans submitted by pipeline operators. This amounts to a partial response to only one of the five items requested in Plaintiff's October 2, 2012 request. Plaintiff has also received 450 pages of the Tesoro Los Angeles facility response plan, dated December 18, 2012, however, this is still only a partial response to Plaintiff's October 2, 2012 request.
22. To date, Plaintiff has not received any records responsive to its October 22, 2012 request (2013-0011). Defendant has given no indication that production is imminent and has not engaged in a rolling production schedule.
23. Defendant has not contacted Plaintiff to address request 2013-2011 since sending its initial confirmation and fee waiver on October 24, 2012.
24. To date, Plaintiff has received no additional communications or records responsive to request 2013-2001 following the initial confirmation and fee waiver on October 9, 2012 and an initial response to Plaintiff's request for facility response plans dated November 15, 2012 and December 15, 2012.

25. Plaintiff has afforded Defendant ample time beyond the twenty work-day timeframe by which it is legally required to respond to the requests.
26. More than 100 days have passed since Plaintiff submitted its October 2, 2012 FOIA request to Defendant and more than 70 days have passed since Plaintiff submitted its October 22, 2012 FOIA request.
27. Plaintiff has fully exhausted its administrative remedies for its request submitted on October 2, 2012 (2013-0001) and for its request submitted on October 22, 2012 (2013-0011).
- Administrative remedies are deemed exhausted whenever an agency fails to comply with the applicable time limits, as stated by 5 U.S.C. § 552(a)(6)(C)(i). Plaintiff now turns to this Court to enforce the remedies and public access to agency records guaranteed by FOIA.

CAUSE OF ACTION

Count 1: Violation of the Freedom of Information Act

28. Plaintiff incorporates the allegations in paragraphs 1 through 27.
29. Defendant's failure to disclose all requested records in response to the October 2, 2012 request (request number 2013-0001) is a constructive denial and wrongful withholding of records in violation of FOIA, 5 U.S.C. § 552, and the Agency's own regulations promulgated thereunder.
30. Defendant's failure to disclose the requested records in response to the October 22, 2012 request (request number 2013-0011) is a constructive denial and wrongful withholding of records in violation of FOIA, 5 U.S.C. § 552, and the Agency's own regulations promulgated thereunder.

Relief Requested

WHEREFORE, Plaintiff respectfully requests that this Court:

- i. Enter an Order declaring that PHMSA has wrongfully withheld the requested Agency records;
- ii. Issue a permanent injunction directing PHMSA to disclose to Plaintiff all wrongfully withheld records;
- iii. Maintain jurisdiction over this action until PHMSA is in compliance with FOIA, the Administrative Procedure Act, and every order of this Court;
- iv. Award Plaintiff its attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
- v. Grant such additional and further relief to which the Plaintiff may be entitled.

Dated: April 10, 2013

Respectfully submitted,

/s/ Kathryn Douglass
Kathryn Douglass, DC Bar # 995841
Public Employees for Environmental
Responsibility,
200 P Street, NW Suite 240
Washington, D.C. 20036
(202) 265-7337

Counsel for Plaintiff